Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

IN RE AR ACCESSORIES GROUP, INC.

BANK ONE, NA,

Petitioner,

v.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a bankruptcy petition is filed, an "automatic stay" arises under 11 U.S.C. § 362(a), prohibiting the postpetition creation or perfection of liens against property of the bankruptcy estate. An exception to the automatic stay permits creditors to perfect a lien where the applicable state law permits the perfection "to be effective against an entity that acquires rights in such property before the date of perfection." The question presented is:

> Whether this exception to the automatic stay, contained in 11 U.S.C. §§ 362(b)(3) and 546(b)(1)(A), applies to any lien that primes others, or only to liens that "relate back" in time so as to have an effective date that is earlier than the date the lien is perfected?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Bank One, NA (f/k/a Bank One, Wisconsin) ("Bank One") is a corporation whose parent corporation is Bank One Corp., which, in turn, is publicly held and owns more than 10% of the stock of Bank One, NA.

Bank One, NA serves as the agent bank for itself and two other banks with respect to loans at issue in this case: (1) U.S. Bank National Association, a corporation whose parent corporation is U.S. Bancorp, Inc., which, in turn, is publicly held and owns more than 10% of the stock of U.S. Bank National Association; and (2) Harris Trust and Savings Bank, a corporation whose parent corporations are Harris Bancorp, Inc., Bankmont Financial, Corp. and Bank of Montreal, the last of which is publicly held and indirectly owns more than 10% of the stock of Harris Trust and Savings Bank.

The other plaintiff (who was a plaintiff in the Bankruptcy Court, an appellant in the District Court and an appellee in the Seventh Circuit Court of Appeals) is Scott Peltz (the "Trustee"), who is the trustee of the AR Accessories Group, Inc. Liquidating Trust, and became the successor-in-interest to AR Accessories Group, Inc. (the "Debtor"), the Chapter 11 debtor in these proceedings, pursuant to the Debtor's confirmed Chapter 11 plan of liquidation.

The respondent is the Wisconsin Department of Workforce Development (the "State"), an agency of the state of Wisconsin. The State was the defendant in the original action filed by Bank One and the Trustee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bank One respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 345 F.3d 454 (App., *infra*, 2a-9a). The decision of the United States District Court for the Eastern District of Wisconsin is reported at 283 B.R. 259 (App., *infra*, 10a-21a). The District Court also entered an unpublished "Order Supplementing the Court's June 11, 2002 Decision and Order," to satisfy the requirements of 28 U.S.C. § 1292(b). (App., *infra*, 22a-25a). The decision of the United States Bankruptcy Court for the Eastern District of Wisconsin is reported at 267 B.R. 583 (App., *infra*, 26a-62a).

JURISDICTION

The Seventh Circuit issued its opinion on September 22, 2003. (App., *infra*, 2a). The Seventh Circuit denied Petitioner's petition for rehearing on October 28, 2003. (App., *infra*, 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a [bankruptcy] petition . . . operates as a stay, applicable to all entities, of -
>
> * * * *
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> * * * *
>
> (b) The filing of a [bankruptcy] petition . . . does not operate as a stay -
>
> * * * *
>
> (3) under subsection (a) of this section, of any act to perfect . . . an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title . . . .

Section 546(b)(1) of the Bankruptcy Code, 11 U.S.C. § 546(b)(1), provides in relevant part:

> The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that -
>
> (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection . . . .

STATEMENT OF THE CASE

1. Introduction

Prior to filing its voluntary Chapter 11 bankruptcy case in March 1998, the Debtor sold and distributed leather products and accessories. Petitioner Bank One was the Debtor's principal prepetition secured lender and, as of the commencement of the bankruptcy case, held a properly perfected, first priority security interest in virtually all of the Debtor's assets. As a result of its troubled financial condition, the Debtor terminated several hundred employees in the State of Wisconsin during the few months before and after its bankruptcy filing. The Debtor paid all (or nearly all) of the basic wages and salaries owed to the terminated employees, but many employees were owed vacation and severance pay.

Nearly three months after the bankruptcy filing, with full knowledge that the Debtor was under the protection of federal bankruptcy law, the State filed wage lien petitions in two Wisconsin state courts, asserting a claim in the amount of $5.27 million on behalf of the Debtor's former employees

under Wisconsin law. The State then filed a proof of claim in the Debtor's bankruptcy case in the same amount and asserted, based upon the lien petitions, that its claim is secured by a lien on all of the Debtor's property. Moreover, citing to the Wisconsin wage lien statute, the State claimed that its lien is a "superpriority" lien, taking precedence over all other liens and encumbrances, including the preexisting security interests of Bank One. *See* Wis. Stat. § 109.09(2).[1]

Bank One challenged the lien of the State, contending that the lien is void because it was filed in violation of the automatic stay that arises under 11 U.S.C. § 362(a) when a bankruptcy petition is filed.[2] The automatic stay broadly prohibits the creation, perfection or enforcement of a lien on the Debtor's property after the commencement of a bankruptcy case. 11 U.S.C. § 362(a)(4) and (5). The State claimed that its actions were permitted under an exception to the automatic stay that permits a creditor to perfect a lien where the law authorizing the lien permits the perfection "to be effective against an entity that acquires rights in such property before the date of perfection." 11 U.S.C. §§ 362(b)(3) and 546(b)(1)(A).

Authority from this Court, the Third Circuit, the legislative history and the leading bankruptcy treatise *all* state unequivocally that section 546(b)(1)(A) permits perfection of a lien after the commencement of a bankruptcy case only

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[1] All references to Chapter 109 of the Wisconsin Statutes are to that version in effect at the time the lien petitions were filed on June 11 and 12, 1998.

[2] Bank One was joined on the complaint by the Trustee of the liquidating trust created pursuant to the confirmed plan of liquidation in the Debtor's Chapter 11 case.

where the lien relates back in time to a prepetition date. *See Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 215-16, 118 S. Ct. 651 (1998) ("Section 546(b)(1)(A) speaks of state laws that permit 'perfection . . . to be effective . . . before the date of perfection.'"); *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 85 (3d Cir. 1989) ("Those exceptions [to the automatic stay] extend only to cases in which an interest is created prior to bankruptcy and its post-petition perfection relates back, as a matter of law, to the date of its creation."); H.R. 595, 95th Cong., 371 (1977), S. 989, 95th Cong., 86 (1978) ("The rights granted to a creditor under this subsection prevail over the trustee only if the transferee has perfected the transfer in accordance with applicable law, and that perfection relates back to a date that is before the commencement of the case."); 5 COLLIER ON BANKRUPTCY § 546.03[2][c][i] (Lawrence P. King ed., 15th ed. rev. 2000) ("The applicable law must provide that perfection . . . of an interest in property relates back in time to be superior in priority to the interest of any entity acquiring rights in the property before the date of perfection . . . . Furthermore, perfection must relate back to a prepetition period."). Given that the wage lien asserted by the State does not relate back to any earlier date, *see* Wis. Stat. § 109.09, Bank One contended that the lien did not fit within the exception to the stay.

2. The Case in the Seventh Circuit

The Seventh Circuit — without discussing or citing *any* authority at all — held that a superpriority lien statute need not contain language expressly providing for perfection to relate back to a prepetition date in order to trigger section 546(b)(1)(A). In fact, the Seventh Circuit held that the language of section 546(b)(1)(A) is unambiguously contrary to the authority of this Court, the Third Circuit, the

legislative history and the leading bankruptcy treatise — meaning that it viewed such authority not merely as incorrect, but as positing an unreasonable interpretation of the statute.

The filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act to create, perfect, or enforce any lien against property of the estate" or "against property of the debtor . . . to the extent such lien secures a claim that arose" prepetition. 11 U.S.C. § 362(a)(4) and (5). The automatic stay is a "fundamental protection" of bankruptcy law that gives debtors "breathing room by stopping collection efforts in their tracks and permitting their resumption only when the stay is lifted by the bankruptcy court or dissolved by operation of law." *Soares v. Brockton Credit Union*, 107 F.3d 969, 975 (1st Cir. 1997). The stay was designed by Congress to "protect the relative position of all creditors" and, accordingly, "[b]oth public and private creditors are subject to the stay." *In re Glaspy Marine Indus., Inc.*, 971 F.2d 391, 394 (9th Cir. 1992). Actions taken in violation of the automatic stay are void. *In re Vierkant*, 240 B.R. 317, 322 (BAP 8th Cir. 1999) ("The overwhelming majority of the circuits hold that an action in violation of the automatic stay is void *ab initio*.").

Section 362(b) of the Code contains a list of exceptions to the automatic stay. These exceptions identify particular types of actions that would be stayed under the broad language of section 362(a), but are expressly exempted from the stay for various policy reasons. Because the automatic stay is a fundamental protection designed to ensure that all creditors are treated fairly and equally, exceptions to the stay are to be construed narrowly. *In re Glasply Marine Indus., Inc.*, 971 F.2d 391, 394-95 (9th Cir. 1992); *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 85 (3d Cir. 1989).

One exception, contained in section 362(b)(3) of the Code, permits a creditor to "perfect . . . an interest in property" after the commencement of the case to the extent that the bankruptcy trustee would be subject to the creditor's action under section 546(b) of the Code. Section 546(b), in turn, provides that the bankruptcy trustee is "subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection." Code § 546(b)(1)(A).

Thus, despite the automatic stay, a potential lien creditor is permitted to perfect its lien postpetition if such perfection would "be effective against an entity that acquires rights in such property before the date of perfection." This petition asks the Court to interpret this language and answer the following question: Does the exception to the automatic stay contained in 11 U.S.C. §§ 362(b)(3) and 546(b)(1)(A) apply to any lien that primes others, or only to liens that "relate back" in time so as to have an effective date that is earlier than the date the lien is perfected? The Seventh Circuit decided the exception applies to any lien that primes other liens. Bank One contends the exception applies only where the lien relates back to, and is effective as of, a prepetition date.

The Seventh Circuit rejected Bank One's argument that the language of section 546(b)(1)(A) can reasonably be read in two different ways. The phrase "before the date of perfection" can refer to either the date an entity acquires rights in the property, or the date the perfected interest becomes effective. In the first case, the result is that the "perfection . . . [is] effective against an entity that [has] acquire[d] rights in such property before the date of perfection," as the Seventh Circuit concluded. In the latter

case, the result is a provision that speaks of perfection that is "effective . . . before the date of perfection" (*i.e.*, a lien that relates back to an earlier date), as Bank One has contended and as the District Court concluded.

To illustrate the ambiguity, what follows is the language of section 546(b)(1)(A) as well as the two reasonable interpretations of that language:

> ***Statute***: The bankruptcy trustee is subject to any state law that "permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection."
>
> ***Seventh Circuit's interpretation***: The bankruptcy trustee is subject to any state law that "permits perfection of an interest in property to be effective against an entity" that, "before the date of perfection," "acquire[d] rights in such property."
>
> ***Bank One's interpretation***: The bankruptcy trustee is subject to any state law that "permits perfection of an interest in property to be effective . . . before the date of perfection" "against an entity that acquire[d] rights in such property."

The Seventh Circuit found "no such ambiguity in the text." (App., *infra*, 7a). In fact, the Seventh Circuit explained that ambiguity could be found in the language only by resorting to "syntactic strain." (App., *infra*, 7a). Yet this Court, discussing this exact statutory provision just six years ago, explained:

> It is *quite certain*, to begin with, that in the relevant context Congress sometimes used the word

> "perfection" to mean the legal conclusion that for such purposes as calculating priorities perfection of a lien should be treated as if it had occurred on a particular date, and sometimes used it to refer to the acts necessary to support that conclusion. *Section 546(b)(1)(A) speaks of state laws that permit "perfection . . . to be effective . . . before the date of perfection."* The distinction implicit in speaking of "perfection" antecedent to the "date of perfection" shows that *Congress was thinking about the difference between the legal conclusion that may be entailed by applying a relation-back rule* and, on the other hand, the acts taken to trigger an application of the rule.

Fidelity Fin. Servs., Inc. v. Fink, 522 U.S. 211, 215-16, 118 S. Ct. 651 (1998) (emphasis added) (citation omitted).

The Seventh Circuit inexplicably failed to even mention the *Fidelity Financial* case, despite the District Court's discussion of it and Bank One's analysis of it. While Bank One believes this Court's observations in *Fidelity Financial* were correct, and the Seventh Circuit's conclusion in this case is incorrect, the first step in determining whether an ambiguity exists is merely to determine whether this Court's interpretation in *Fidelity Financial* is at least *plausible*. When the Seventh Circuit determined that section 546(b)(1)(A) is not ambiguous (*i.e.*, not reasonably subject to more than one interpretation), it necessarily concluded as an intermediate step that other potential meanings of the provision — including the interpretation offered by this Court in *Fidelity Financial* — are not even plausible. The unavoidable implication of the Seventh Circuit's decision is that the language quoted from the *Fidelity Financial* opinion is not just mistaken, but is *not even reasonable* with respect to an

observation that this Court (unanimously, though admittedly in dictum) described as "quite certain."

Courts interpreting ambiguous provisions in federal statutes "must look to the legislative history to determine Congress' intent." *Central States, Southeast and Southwest Areas Pension Fund v. Robinson Cartage Co.*, 55 F.3d 1318, 1323 (7th Cir. 1995). The official legislative report to section 546 very clearly expresses Congress's intention that section 546(b)(1)(A) apply *only* when a lien relates back in time:

> The rights granted to a creditor under this subsection prevail over the trustee *only if* the transferee has perfected the transfer in accordance with applicable law, and *that perfection relates back to a date that is before the commencement of the case*.
>
> The phrase "generally applicable law" relates to those provisions of applicable law that apply both in bankruptcy cases and outside of bankruptcy cases. For example, many State laws, under the Uniform Commercial Code, permit perfection of a purchase-money security interest to *relate back* to defeat an earlier levy by another creditor if the former was perfected within ten days of delivery of the property. U.C.C. § 9-301(2). . . . The purpose of the subsection is to protect, in spite of the surprise intervention of a bankruptcy petition, those whom State law protects by allowing them to *perfect their liens or interests as of an effective date that is earlier than the date of perfection*.

H.R. 595, 95th Cong., 371 (1977) (emphasis added); S. 989, 95th Cong., 86 (1978).

Thus, the legislative history supports Bank One's interpretation by expressly stating that the provision applies "only if . . . perfection relates back to a date that is before commencement of the case." *Id.* Compare the language of the legislative history -- "perfect their . . . interests as of an effective date that is earlier than the date of perfection" -- with the interpretation advocated by Bank One above -- "perfection of an interest in property to be effective . . . before the date of perfection." Both versions incorporate the concept of retroactive perfection, which was also the focus of this Court's discussion in *Fidelity Financial Services*. *Fidelity Fin. Servs.*, 522 U.S. at 215-16. The legislative history provides a stunningly clear answer to the ambiguity by declaring that only nonbankruptcy laws that relate back to a prepetition date can be effective against the bankruptcy trustee.

Additionally, Bank One cited to the structure and context of the Bankruptcy Code for further support of its position. The Seventh Circuit, however, not only rejected Bank One's arguments, but refused to even address the arguments, other than to conclude that section 546(b)(1)(A) is unambiguous.

3. Jurisdiction in the Lower Courts

This case originated in the Bankruptcy Court, which had jurisdiction of the Debtor's Chapter 11 bankruptcy case under 28 U.S.C. § 1334(a) and 11 U.S.C. § 157(b)(1), and that court also had jurisdiction of the adversary proceeding filed by Bank One and the Trustee against the State pursuant to 28 U.S.C. §§ 157(b)(1) and 157(b)(2)(B), (K) and (O). The Bankruptcy Court found in favor of the State, holding that the State's actions fell within the exception to the automatic stay. (App., *infra*, 40a). Consequently, the Bankruptcy Court granted the State's motion for partial summary judgment and

denied the motion of Bank One and the Trustee for partial summary judgment. (App., *infra*, 47a).

The District Court reversed, finding that the statutory language was ambiguous as to whether the exception to the automatic stay applies to a state lien law that does not provide for retroactive perfection. (App., *infra*, 16a). Relying on authority from this Court, the Third Circuit, the legislative history and the leading bankruptcy treatise, the District Court held that section 546(b)(1)(A) permits postpetition perfection of a lien *only* where the lien relates back in time to a prepetition date. (App., *infra*, 19a). The District Court had jurisdiction under 28 U.S.C. § 158(a)(3).

REASONS FOR GRANTING THE PETITION

This case warrants an exercise of this Court's certiorari jurisdiction. A split of authority exists among the Circuit Courts of Appeal, where inconsistent approaches to the application of section 546(b)(1)(A) now provide conflicting rules prescribing the right of certain creditors to perfect liens against property of the bankruptcy estate despite the automatic stay. The conflict is particularly evident when the subject lien is entitled to special priority under state law — a privilege granted most often by states to themselves or to local governmental bodies. If the judgment of the Seventh Circuit is allowed to stand, state and local governments will have extraordinary authority to file liens against property of a bankruptcy estate despite the restriction of the automatic stay. In fact, in a surprising irony, under the Seventh Circuit's decision, it is only when a state takes a dramatic and aggressive approach to a particular lien — by granting it superpriority — that it becomes exempt from the automatic stay. In other words, those liens that are most disruptive to the debtor and most detrimental to other creditors will also,

according to the Seventh Circuit, qualify as exempt from the automatic stay.

An Irreconcilable Conflict Exists Among the United States Courts of Appeal.

With its decision in this case, the Seventh Circuit joined the First Circuit and the Second Circuit in explicitly rejecting the proposition that section 546(b)(1)(A) applies only where the state law provides for retroactive perfection. *See In re 229 Main Street Ltd. P'ship*, 262 F.3d 1, 11 (1st Cir 2001) ("The key is not relation back, but, rather, whether the statute in question provides for an interest that, once perfected, trumps earlier-filed claims."); *In re Lionel Corp.*, 29 F.3d 88, 93 (2d Cir. 1994) ("We see nothing in § 546(b) indicating that it applies only when the lienor fits within a 'relation back' statute."). In the Second Circuit, another case applied section 546(b)(1)(A) in a manner that seems inconsistent with the relation back rule, without discussing the rule. *See In re Parr Meadows Racing Ass'n, Inc.*, 880 F.2d 1540, 1546-48 (2d Cir. 1989) (focusing on the existence of a prepetition interest in property as the essential trigger to section 546(b)(1)(A), rather than any retroactive effect of the lien).

The Third Circuit, on the other hand, has several times held that relation back *is* required for a lien to trigger the automatic stay exception contained in section 546(b)(1)(A). *Makoroff v. City of Lockport*, 916 F.2d 890, 893-94 (3d Cir. 1990) ("If the city and county tax liens date back to a prepetition interest in debtor's property, there would be no violation of the automatic stay in this case, even if the tax liens were perfected post-petition."); *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 85 (3d Cir. 1989) ("Those exceptions [to the automatic stay contained in

section 546(b)] extend only to cases in which an interest is created prior to bankruptcy and its post-petition perfection relates back, as a matter of law, to the date of its creation.") (*citing* S. Rep. No 989, 95th Cong., 2d Sess. 86, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5872; H. Rep. No. 595, 95th Cong., 2d Sess. 371 *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6327.); *see also In re Yobe Electric, Inc.*, 728 F.2d 207 (3d Cir. 1984) (although not involving a priming lien, the court found that the filing of a mechanic's lien did not violate the automatic stay because it related back to a prepetition date).

At least one other Circuit Court has applied the relation back rule, although without using the magic words that the lien "relates back" to a prepetition date. *See In re Glasply Marine Indus., Inc.*, 971 F.2d 391 (9th Cir. 1992). As the court in *Glasply Marine* explained, "[i]f a creditor possess a pre-petition interest in property . . . and state law establishes a time period for perfection of a lien based on that interest, the creditor may still perfect the lien post-petition." *Id.* at 394. Applying Washington state law, the court found that the subject liens were based on the aggregate amount of the county levy completed in October of each year, but that the property taxes become an attachable lien on the property as of January 1 of the levy year. *Id.* Given that the debtor filed bankruptcy in 1986, the court determined the property taxes for 1988 and 1989 could not have become liens on the property prepetition. *Id.*

Without discussing the relation back rule, the Fourth Circuit has applied section 546(b)(1)(A) in a manner that is inconsistent with the rule. *See Maryland Nat'l Bank v. Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983). Like the Second Circuit in *Parr Meadows*, the case focuses on the existence of a prepetition interest in property

as the essential trigger to section 546(b)(1)(A), rather than the retroactive effect of the lien. In *Maryland Nat'l Bank*, the Fourth Circuit held that the city of Baltimore and the state of Maryland had an "ever-present" interest in real estate located in the state, and that property taxes automatically became liens in favor of the city and state on July 1 of each year. *Id.* at 1142.

With the Seventh Circuit's decision in this case, four circuits have now rejected the relation back rule — the First, Second and Seventh Circuits have done so expressly, while the Fourth Circuit has done so implicitly. The Third Circuit stands firm in expressly endorsing the rule, while the Ninth Circuit has applied the rule, without expressly adopting it.

The conflict among the circuits is irreconcilable. Bank One notes that the Circuit Courts are unlikely to ever make progress toward consensus if the approach of the Seventh Circuit is allowed to stand. Each of the authorities cited herein were cited and discussed by the District Court in its well-reasoned decision and/or in the parties' briefs to the Seventh Circuit. Inexplicably, the Seventh Circuit did not cite or discuss a single case, treatise, legislative history or other authority in concluding that the language of section 546(b)(1)(A) is unambiguous.[3] The Seventh Circuit's

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[3] Moreover, the Seventh Circuit's explanation of the two possible meanings of section 546(b)(1)(A) is extremely difficult to follow:

> The district court found this provision to be ambiguous, insofar as the phrase "before the date of perfection" might modify the language "any [sic] entity that acquires rights in such property"—in which case perfected interest takes effect (with superpriority) when it is perfected because any other property interest acquired pre-

cursory treatment of this important bankruptcy issue alone should concern this Court.

Uniformity on this issue is also important to bankruptcy administration nationally. The current split of authority is likely to encourage the practice of forum shopping. Moreover, a very real possibility exists that bankruptcy courts located in different circuits will inconsistently apply the law of a single state. *See Makoroff v. City of Lockport*, 916 F.2d 890, 893-94 (3d Cir. 1990) (Weis, J., concurring and dissenting) (noting that the majority interpreted the identical New York law differently than the Second Circuit had in *Parr Meadows*).

The Court should also recognize that the legislative history of section 546(b)(1)(A) indicates the subsection "is not designed to give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases." H.R. 595, 95th Cong., 371 (1977); S. 989, 95th Cong., 86 (1978). And yet, the Seventh Circuit's decision

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> perfection is subject to the perfected interest—or it might modify the language "permits perfection of an interest in property to be effective"—in which case the exception might be construed to apply only to laws containing explicit "relation-back" language, because the effectiveness of the perfected interest would be independent of the event of any entity acquiring rights in the property and would thus require the priming statute to specify an independent effective date.

(App., *infra*, 7a). It is certainly possible that the court's own muddled phrasing of the two statutory meanings caused it to reject the second meaning.

will certainly encourage states to grant special lien priority to their own claims and the claims of local governments. After all, the path in the Seventh Circuit is now clear — a superpriority lien not only allows the state to trump all other creditors, but also automatically triggers an exception to the automatic stay so that the state can obtain its lien after the debtor has filed bankruptcy. If allowed to stand, the Seventh Circuit's decision would "permit [state and] local governments to 'pull out chunks of an estate from the reorganization court and (would) seriously impair the power of the court to administer the estate.'" *In re Glasply Marine Indus., Inc.*, 971 F.2d 391, 395 (9th Cir. 1992) (quoting *Gardner v. New Jersey*, 329 U.S. 565, 577, 67 S. Ct. 467, 473, 91 L.Ed. 504 (1947)). Of course, the debtor and all of the other creditors suffer as a result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No.: 02-3595

[Oct. 28, 2003]

IN RE: AR ACCESSORIES GROUP, INCORPORATED, *Debtor*.	)
APPEAL OF: WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, *Appellant*.	)

Before Hon. WILLIAM J. BAUER, *Circuit Judge*; Hon. MICHAEL S. KANNE, *Circuit Judge*; Hon. ILANA DIAMOND ROVNER, *Circuit Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-captioned case by plaintiffs-appellees, Bank One, NA and Scott Peltz, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing and suggestion for rehearing *en banc* are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No.: 02-3595

[Sept. 22, 2003]

IN RE AR ACCESSORIES GROUP, INCORPORATED, *Debtor.*	)
APPEAL OF: WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, *Appellant.*	)

On Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 01 C 944
Rudolph T. Randa, Chief Judge

Before BAUER, KANNE, and ROVNER, *Circuit Judges*.

BAUER, *Circuit Judge*. This interlocutory appeal from a district court decision reversing an opinion of the bankruptcy court requires us to decide whether a generally applicable state law providing for the superpriority status of certain wage liens must contain language expressly providing for retroactive perfection of the lien interest in order to trigger an exception to the automatic stay provision of the Bankruptcy

Code. Because we agree with the bankruptcy court's determination that the state statute need not contain such language, we reverse the decision of the district court holding otherwise, and remand the case with instructions that the district court affirm the decision of the bankruptcy court.

BACKGROUND

After AR Accessories, Inc. ("Debtor"), formerly a distributor and vendor of leather products in Wisconsin, filed a bankruptcy petition in March 1998, the auction proceeds of its liquidated assets totaled approximately $23,000,000. All of Debtor's roughly 300 employees had been laid off by May 1998. In June 1998, the Wisconsin Department of Workforce Development ("Department") filed a petition for a wage earner's lien pursuant to Wisconsin law on behalf of Debtor's former employees seeking to recover unpaid vacation and severance pay in the amount of $5,270,000.

Appellee Scott Peltz eventually joined Appellee Bank One, N.A., as a plaintiff in an adversarial complaint filed against the Department in the bankruptcy court.[1] Bank One, N.A., and Peltz (collectively, "Appellees") alleged, inter alia, that the Department's wage lien violated a provision of the automatic stay provision of the Bankruptcy Code, which creates a statutory injunction—and a private right of action for violations thereof—against debt-collection efforts outside of the bankruptcy proceedings. *See* 11 U.S.C. § 362(a).

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[1] Peltz is the named trustee of the AR Accessories Group, Inc. Liquidating Trust, successor-in-interest to Debtor in these proceedings. Bank One, N.A., f/k/a Bank One, Wisconsin, a creditor of Debtor, initially filed the complaint on its own behalf and as agent for First Bank Milwaukee, N.A., and Harris Bank, also creditors.

Appellees claimed that the wage lien was void *ab initio* because it was created after Debtor had filed its petition for bankruptcy.

The Department responded that the wage lien fit within an exception to the automatic stay provision that makes the stay inapplicable to "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are . . . *subject to any generally applicable law* that permits perfection of an interest in property to be effective against an entity that acquires rights in such property *before the date of perfection*." 11 U.S.C. §§ 362(b)(3) & 546(b)(1)(A)(emphasis added). The wage lien, in turn, was created pursuant, in relevant part, to the following Wisconsin statutory provisions:

> The [D]epartment . . . shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency. A lien under this subsection takes effect when the [D]epartment . . . file[s] a verified petition claiming the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed [and duly serves notice thereof upon the employer] . . . within 2 years after the date that the wages were due. . . . The lien shall take precedence over all other debts, judgments, decrees, liens or mortgages against the employer [subject to certain enumerated exceptions inapplicable to these facts].

Wis. Stat. § 109.02(2).[2] Because the Wisconsin statute was a generally applicable law, the Department maintained, it created and perfected a valid lien having superpriority over the interests of Bank One and other creditors pursuant to the Bankruptcy Code's exception to the automatic stay provision.

In reply, Appellees argued that the Wisconsin statute did not trigger the exception provision because it contained no language expressly providing for retroactive perfection (thereby relating the lien interest back to a prepetition date), as required under 11 U.S.C. §§ 362(b)(3) & 546(b)(1)(A).

The parties filed cross motions for partial summary judgment on this and other claims unrelated to our disposition of the matter on appeal. The bankruptcy court held that 11 U.S.C. § 546(b)(1)(A) did not require that a priming statute, in this case the Wisconsin statute, expressly provide for retroactive perfection in order to trigger the exception to the automatic stay provision, and granted partial summary judgment in favor of the Department on this claim.

Appellees subsequently filed an interlocutory appeal challenging the bankruptcy court's determination that 11 U.S.C. § 546(b)(1)(A) did not require a priming statute to contain such express provision for retroactive perfection. They argued, in the alternative, that the Department held no prepetition interest in the property as required under 11 U.S.C. § 546(b)(1)(A). Finding that the language of 11 U.S.C. § 546(b)(1)(A) was ambiguous, and relying therefore on that provision's legislative history, the district court

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[2] The Wisconsin wage lien statute has been amended variously since its adoption in 1975. We refer here and throughout to the version in effect at the time of the decision of bankruptcy court.

concluded that it was intended "to apply only to statutory liens which allow perfection to 'relate back' to a specific date, as opposed to those which are merely afforded 'superpriority' status."[3] Based on this finding, the district court (i) reversed the portion of the bankruptcy court's decision holding that Department's actions to perfect the wage lien did not violate the automatic stay, (ii) vacated its grant of partial summary judgment on the issue, and (iii) granted partial summary judgment in favor of Appellees.

This appeal ensued.

ANALYSIS

We review the grants of summary judgment of both the district court and the bankruptcy court de novo. *See, e.g.*, *Hoseman v. Weinschneider*, 322 F.3d 468, 473 (7th Cir. 2003).

Whether 11 U.S.C. § 546(b)(1)(A) requires the Wisconsin statute to provide expressly for retroactive perfection of the lien interest turns on a construction of the following language:

> The rights and powers of a trustee . . . are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection.

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[3] Because the court found for the Department on the issue of retroactive perfection language, it did not reach the issue of the whether the Department held a prepetition interest in the property.

(11 U.S.C. § 546(b)(1)(A)). The district court found this provision to be ambiguous, insofar as the phrase "before the date of perfection" might modify the language "any entity that acquires rights in such property"—in which case perfected interest takes effect (with superpriority) when it is perfected because any other property interest acquired pre-perfection is subject to the perfected interest—or it might modify the language "permits perfection of an interest in property to be effective"—in which case the exception might be constructed to apply only to laws containing explicit "relation back" language, because the effectiveness of the perfected interest would be independent of the event of any entity acquiring rights in the property and would thus require the priming statute to specify an independent effective date.

We find no such ambiguity in the text of the statute. The phrase "before the date of perfection" appears in immediate proximity to the language, "any entity that acquires rights in such property," which language *separates* "before the date of perfection" from "permits perfection of an interest in property to be effective." We therefore find that the text of the statute unambiguously expresses the former of the two meanings considered by the district court. Had Congress intended otherwise, we presume that it would have drafted the provision such that any alternative meaning might be discerned without resort to the syntactic strain entertained by the district court and urged by Appellees. Accordingly, we hold that a priming statute need not contain language expressly providing for retroactive perfection in order to trigger the exception provided in 11 U.S.C. § 546(b)(1)(A) to the automatic stay of postpetition efforts to perfect a property interest. The Wisconsin statute therefore fits within the automatic stay exception, and the Department's lien does not violate the automatic stay provision.

Appellees urge this court to affirm the decision of the district court on the alternative grounds, not considered by the district court, that the Department held no prepetition lien interest, as 11 U.S.C. § 546(b)(1)(A) requires. In other words, the Department's postpetition perfection of the wage lien is meaningless, because the Department had no interest in the unpaid wages of Debtor employees prior to Debtor's filing of the bankruptcy petition. The lien interest did not exist, they contend, until the Department filed and served notice of the lien petition on Debtor. The bankruptcy court rejected this argument, finding instead that the lien interest was created when the last services were performed for which wages are unpaid and owing.

Specifically, the bankruptcy court noted that certain amendments made in 1993 to the Wisconsin law governing wage liens—including the deletion of language providing that a lien interest exists "as of the last date on which services were performed for the employer and for which wages are due and owing"—were intended to provide procedures for perfection and enforcement, rather than creation, of the lien. In support of this assertion, the bankruptcy court cited portions of a letter written by the then general counsel to the Department explaining that, "[t]hese changes are intended to do no more than allow wage lien claims to go forward as any other lien claim does." The bankruptcy court relied further on the conclusion of the Wisconsin Court of Appeals that "the amendment simply added an enforcement mechanism to a previously established right, thus producing a *procedural* change." *Pfister v. Milwaukee Econ. Dev. Corp.*, 576 N.W.2d 554, 558 (Wis. App. 1998). We agree with the bankruptcy court that the 1993 amendment does not substantively alter the statute to change the effective date of a wage lien interest from the time that the last unpaid services

are performed to the time of the filing of the lien petition.[4] Neither party disputes that unpaid prepetition wages are due in this case. We therefore decline Appellee's invitation to affirm the decision of the district court on grounds properly rejected by the bankruptcy court.

CONCLUSION

For the foregoing reasons, we REVERSE the decision of the district court and REMAND the case with instructions to affirm the bankruptcy court's grant of partial summary judgment in favor of the Department on the foregoing issues.

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[4] This conclusion is also consistent with Department's role as protector and enforcer of the rights of workers in Wisconsin. Once an employee provides services to an employer, he is entitled to wages in return. The wage lien is thus a mechanism for the Department's enforcement of a preexisting right on behalf of the employee. The filing of the wage lien petition puts the employer and others on notice of the existence of a claim to the employer's property in exchange for unpaid services. It does not, however, create any new interest within the meaning of 11 U.S.C. § 546(b).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 01-CV-944

[Filed June 11, 2002]

SCOTT PELTZ, Trustee of the AR ACCESSORIES GROUP, INC. LIQUIDATING TRUST, and BANK ONE, WISCONSIN,
Plaintiffs-Appellants,

-vs-

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,
Defendant-Appellee.

DECISION AND ORDER

This bankruptcy appeal asks the Court to decide the proper interplay between two provisions of the Bankruptcy Code: 11 U.S.C. § 362(a)(4), the "automatic stay provision," which provides that once a bankruptcy petition is filed "any act to create, perfect, or enforce any lien against property of the estate" is void, and 11 U.S.C. § 546(b)(1)(A), an exception to the "automatic stay provision" which states that the trustee in bankruptcy is subject to any generally applicable

law that "permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection." On March 13, 1998, the Debtor, AR Accessories, Inc., filed for bankruptcy under Chapter 11. On June 11, 1998, the Creditor, Wisconsin Department of Workforce Development (the "Department"), filed a "Petition for a Wage Lien under Section 109.09(2), Wis. Stats." in both Milwaukee and Washington County Circuit Court. On July 18, 2001, the Honorable James E. Shapiro, Bankruptcy Judge for the Eastern District of Wisconsin, issued a decision which held, in part,[1] that the Department's actions to perfect its lien fit within the exception set forth at § 546(b)(1)(A) and therefore did not violate the automatic stay provision.

On November 13, 2001, the Court granted the Debtor leave to file this interlocutory appeal.[2] For the reasons stated below, the Court finds that § 546(b)(1)(A) *does not* apply to the case at bar. Therefore, the Department *did* violate the automatic stay provision. Accordingly, the Bankruptcy Court's decision in this respect is reversed.

BACKGROUND

Before filing for bankruptcy, AR Accessories distributed and sold leather products and accessories, employing approximately 300 people in Wisconsin. By May of 1998, all of its employees had been laid-off. After filing for bankruptcy in March of 1998, the Debtor's assets were liquidated and the

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[1] Judge Shapiro also ruled on three other issues, none of which are contested in this appeal. *See In re AR Accessories Group, Inc.*, 267 B.R. 583 (Bankr. E.D. Wis. 2001).

[2] *See* 28 U.S.C. § 158(a)(3).

auction proceeds totaled approximately $23,750,000. In June of 1998, the Department filed a petition for a wage earners' lien under Wis. Stat. § 109.09(2) seeking to recover $5.27 million in unpaid vacation and/or severance pay on behalf of the laid-off workers.

The appellants in this matter are: AR Accessories (the "Debtor"); Bank One, Wisconsin ("Bank One" or the "Lender"), which served as the prepetition secured lenders to the Debtor and, as of March 13, 1998 (the petition date), held a properly perfected, first priority security interest in virtually all of the assets of AR Accessories; and lastly Scott Peltz ("Peltz" or the "Trustee"), successor to the Debtor's interest with respect to assets remaining in the bankruptcy estate. Opposing this appeal is the Department, a Wisconsin agency entrusted with enforcing certain rights of employees under Chapter 109 of the Wisconsin Statutes.

ANALYSIS

Filing a petition for bankruptcy institutes an "automatic stay," making "any act to create, perfect, or enforce any lien against property of the estate" void *ab initio*. *See In re Vierkant*, 240 B.R. 317, 322 (8th Cir. BAP 1999). This "fundamental protection" of bankruptcy law gives debtors "breathing room by stopping collection efforts in their tracks and permitting their resumption only when the stay is lifted by the bankruptcy or dissolved by operation of law." *Soares v. Brockton Credit Union*, 107 F.3d 969, 975 (1st Cir. 1997). Thus, the Department's efforts to perfect a lien against the assets of the Debtor under Wis. Stat. § 109.09(2) are void unless they fall within an exception to the "automatic stay" provision. The enumerated exceptions must be narrowly construed. *See In re Honeycutt*, 228 B.R. 428, 430 (Bankr. E.D. Ark. 1998).

One such exception is found at 11 U.S.C. § 362(b)(3), which makes the automatic stay inapplicable to "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of [the Bankruptcy Code]." In turn, 11 U.S.C. § 546(b)(1)(A) provides that

> (1) The rights and powers of a trustee ... are subject to any generally applicable law[3] that–
>
> (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection.

Accordingly, the issue is whether the Department's actions to perfect a lien against the assets of the Debtor pursuant to Wis. Stat. § 109.09(2) fit within this exception.

Wis. Stat. § 109.09(2) (the "Wage Lien Statute") creates a mechanism for wage earners (or, as here, the Department on behalf of wage earners) to enforce their rights to any wage claim or wage deficiency. Once filed and perfected, the lien

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[3] The parties do not dispute that Wis. Stat. § 109.09(2) is a "generally applicable law" for purposes of § 546(b)(1)(A). All that matters, as Judge Shapiro pointed out, is that the law apply both "inside" and "outside" of bankruptcy, which is certainly the case here.

has "superpriority" status.[4] The Wage Lien Statute,[5] in relevant part, provides as follows:

> The department ... or an employe [sic] ... shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency. A lien under this subsection takes effect when the department or employe [sic] filed a verified petition claiming the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed, pays the fee ... and serves a copy of that petition on the employer by personal service in the same manner as a summons ... or by certified mail with a return receipt requested. The department or employe [sic] must file the petition within 2 years after the date that the wages were due. ... The lien shall take precedence over all other debts, judgments, decrees, liens or mortgages against the employer [subject to certain enumerated exceptions].

Wis. Stat. § 109.09(2).

The appellants have presented two issues for this Court to consider. First, appellants argue that the exception to the

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[4] The lien's superpriority status is subject to certain enumerated exceptions, none of which are relevant to this appeal.

[5] As the statute has undergone numerous revisions and amendments since it was first enacted in 1975, all references to Wis. Stat. § 109.09(2) are to the version in effect at the time the Lien Petition was filed. *See* Appendix to Judge Shapiro's Opinion, part IV. Under this version, either the Department or an individual employee can file a wage earners' lien.

automatic stay is inapplicable because the Wage Lien Statute, even though it grants superpriority status to wage liens, does not "relate back" to a prepetition date, as required by § 546(b)(1)(A). Second, appellants argue that even if "relation back" is not required, the exception is still inapplicable because the Department had no prepetition interest in property, which § 546(b)(1)(A) also requires. The Court finds for the appellants on the first issue and, accordingly, need not reach the second.

The exception set forth at § 546(b)(1)(A) is inapplicable to the case at bar because the Wage Lien Statute does not relate back to a prepetition date

Appellants argue that to fit within this exception, the Wage Lien Statute must contain specific language which relates perfection back to a prepetition date. The Court agrees. The lien in the Wage Lien Statute only "*takes effect* when the department or employe [sic] filed a verified petition claiming the lien with the clerk of the circuit court," and while the "lien shall take precedence over all other debts," specific "relation back" language to a pre-petition date is absent. Judge Shapiro rejected this position. He found first that these wage liens under the Wage Lien Statute were "created before this bankruptcy case was filed." July 18, 2001 Decision, p. 12. He then stated that the Wage Lien Statute creates a "superpriority" lien which, because of this status, "*in effect*" relates back to a prepetition date and trumps or "primes" all previously filed liens. According to Judge Shapiro, this obviates the need for specific relation back language. *See In re 229 Main St. Ltd. P'ship*, 262 F.3d 1, 10-

11 (1st Cir. 2001)[6] (express "relation back" language is not required, as long as the perfection has a "retroactive effect in the sense that once an interest is perfected it will take priority over earlier perfected interests") (*citing In re Lionel Corp.*, 29 F.3d 88, 93 (2nd Cir. 1994)). *See also In re Microfab, Inc.*, 105 B.R. 152, 158 (Bankr. D. Mass. 1989) ("Section 546(b) applies to liens that have that *effect,* regardless of whether the statutes that give rise to those liens use the *concept,* "relation back") (emphasis in original).

Judge Shapiro made this finding after he found (as did the above cited cases) that § 546(b)(1)(A) was unambiguous and resort to the statute's legislative history was unnecessary. This Court finds that § 546(b)(1)(A) *is* ambiguous, requiring resort to the legislative history, examination of which yields a different result. *See Cent. States, Southeast and Southwest Areas Pension Fund v. Robinson Cartage Co.*, 55 F.3d 1318, 1323 (7th Cir. 1995) (holding that when the statutory language is ambiguous, courts "must" look to the legislative history to determine the Congressional intent). The ambiguity is clearly highlighted by the example used by the appellants in their Reply Brief at p. 2. The Court sets it out here.

> Statute: The bankruptcy trustee is subject to any state law that "permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection."

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[6] In his opinion, Judge Shapiro relied on the district court decision, *229 Main St. Ltd. P'ship v. Commonwealth of Mass. Dep't of Envtl. Prot.*, 251 B.R. 186 (D. Mass. 2000), but a month later, the First Circuit affirmed in a published opinion, which the Court has quoted from herein.

> Department's interpretation: The bankruptcy trustee is subject to any state law that "permits perfection of an interest in property to be effective against an entity" that, "before the date of perfection," "acquire[d] rights in such property."
>
> Appellants' interpretation: The bankruptcy trustee is subject to any state law that "permits perfection of an interest in property to be effective ... before the date of perfection" "against an entity that acquired rights in such property."

Under the Department's interpretation of the federal statute, the perfected interest takes effect when it is perfected because any entity that acquired rights in the property prior to the perfection of the interest is subject to it. This result is achieved by finding that the phrase "before the date of perfection" modifies the language "any entity that acquires rights in such property." But, as the above examples show, the phrase "before the date of perfection" can also modify the language "permits perfection of an interest in property to be effective." If so, the perfected interest's effectiveness is severed from the event of any entity acquiring rights in the property and requires the state statute to set an effective date unrelated to this event. In other words, the exception could be read as applying only to laws with specific relation back language.[7]

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[7] The United States Supreme Court, albeit in *dicta,* has endorsed this reading of § 546(b)(1)(A). In the context of discussing the meaning of the word "perfection" in 11 U.S.C. § 547(c)(3)(B), the Supreme Court noted that § 546(b)(1)(A) "speaks of state laws that permit 'perfection ... to be effective ... before the date of perfection.' ... The distinction implicit in speaking of 'perfection' antecedent to the 'date of perfection' shows that Congress was

Given this ambiguity, the Court looks to the legislative history for guidance:

> The rights granted to a creditor under this subsection prevail over the trustee *only if* the transferee has perfected the transfer in accordance with applicable law, *and that perfection relates back to a date that is before the commencement of the case* ... For example, many State laws, under the Uniform Commercial Code, permit perfection of a purchase-money security interest to *relate back* to defeat an earlier levy by another creditor if the former was perfected within ten days of delivery of the property. U.C.C. § 9-301(2) ... The purpose of the subsection is to protect, in spite of the surprise intervention of a bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 371 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 86 (1978) (emphasis added). The leading treatise on bankruptcy law articulates the same rule: "The applicable law must provide that perfection ... of an interest in property *relates back in time* to be superior to the interest of an entity acquiring rights in the property before the date of perfection." COLLIER ON BANKRUPTCY, § 546.03[2][c][i] (emphasis added). Case law also holds that "relation back" is a required element of § 546(b)(1)(A). *See, e.g., Makoroff v. City of Lockport*, 916

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thinking about the difference between the legal conclusion that may be entailed by applying a relation-back rule and, on the other hand, the acts taken to trigger the application of the rule." *Fidelity Financial Services, Inc. v. Fink*, 522 U.S. 211, 215, 118 S. Ct. 651-16, 139 L. Ed. 2d 571 (1998).

F.2d 890 (3d Cir. 1990), *cert. denied*, 499 U.S. 983, 111 S. Ct. 1640, 113 L. Ed. 2d 735 (1991); *Lincoln Sav. Bank v. Suffolk County Treasurer*, 880 F.2d 1540 (2d Cir. 1989), *cert. denied*, 493 U.S. 1058, 110 S. Ct. 869, 107 L. Ed. 2d 953 (1990); *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80 (3d Cir. 1989); *In re Alberto*, 823 F.2d 712 (3d Cir. 1987); *In re Excel Engineering, Inc.*, 224 B.R. 582, 589-90 (Bankr. W.D. Ky. 1998); *In re Peter J. Schmitt Co.*, 154 B.R. 47, 49-51 (Bankr. D. Del. 1993); *Midlantic Nat'l Bank v. Sourlis*, 141 B.R. 826, 837 (D.N.J. 1992). Therefore, § 546(b)(1)(A) was meant to apply *only* to statutory liens which allow perfection to "relate back" to a specific date, as opposed to those which are merely afforded "superpriority" status.

Although critics argue that this distinction "elevate[s] form and semantics over substance in order to defeat a statute that clearly requires just the opposite result," *see Microfab*, 105 B.R. at 158, the Court disagrees. The statute, subject to differing interpretations, is far from clear, and exceptions to the automatic stay must be narrowly construed. Thus, in the absence of clear language to the contrary, the exception is presumptively inapplicable. Furthermore, the distinction involves much more than "semantics." If perfection of a security interest in property "relates back" to a specific date, the law treats that lien as having been perfected *on that date.* To the contrary, if a lien is given superpriority status, even though it defeats all other previously filed liens, the law still treats that lien as having been perfected on the day it was actually perfected. A subtle difference, to be sure, but a difference that the law nonetheless recognizes.[8] The express

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[8] Statutes routinely incorporate specific "relation back" language. For example, under Wisconsin's construction lien law,

purpose of § 546(b)(1)(A), as set forth in the legislative history, is to "protect, in spite of the surprise intervention of a bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests *as of an effective date that is earlier than the date of perfection.*" H.R. Rep. No. 95-595; S. Rep. No. 95-989 (emphasis added). The Wage Lien Statute does not allow perfection to be effective as of a specific date earlier than the actual date of perfection outlined therein. Accordingly, the Department's actions pursuant to the Wage Lien Statute are not excepted from the automatic stay provision of the Bankruptcy Code.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The decision of the Bankruptcy Court with respect to its holding that the Department's actions to perfect its lien did not violate the automatic stay is REVERSED;

2. The Bankruptcy Court's grant of partial summary judgment in favor of the Department on this issue is VACATED; and

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the lien "shall be prior to any lien which originates subsequent to the visible commencement" of work on the project. *See* Wis. Stat. § 779.01(4). Therefore, construction liens "relate back to the commencement of the building without reference to the time when the work was done or material furnished." *See Estate of Riese v. Weber*, 132 Wis. 2d 215, 389 N.W. 2d 640 (Ct. App. 1986). Also, the former version of U.C.C. § 9-301(2), cited by the legislative history quoted above, provided that perfection of a purchase-money security interest can *relate back* to defeat an earlier levy by another creditor if the former was perfected within ten days of delivery of the property.

3. The appellant's motion for partial summary judgment on this issue is GRANTED.

Dated at Milwaukee, Wisconsin, this 11th day of June, 2002.

SO ORDERED,

/s/_____
HON. RUDOLPH T. RANDA
U. S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 01-CV-944

[Filed August 14, 2002]

SCOTT PELTZ, Trustee of the AR ACCESSORIES GROUP, INC. LIQUIDATING Trust, and BANK ONE, WISCONSIN, Plaintiffs-Appellants,	)
v.	)
WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Defendant-Appellee.	)

ORDER SUPPLEMENTING THE COURT'S JUNE 11, 2002 DECISION AND ORDER

Upon the motion of Defendant-Appellee ("the Department"), the Court being fully advised in the premises,

IT IS ORDERED, that the Court's June 11, 2002 Decision and Order ("the Order") is hereby supplemented by the Court's determination that the Order meets the

requirements of 28 U.S.C. § 1292(b), for the following reasons:

A. The only issue decided by the Order is a pure question of law. It effectively controls whether the Department's wage claim is secured or unsecured. If secured, the Debtor's prepetition lenders, Bank One, Wisconsin, Harris Trust and Savings Bank and Firstar Bank, National Association ("the Lenders"), are obligated to disgorge funds (which the Lenders received on a provisional basis as the proceeds from the bankruptcy sale of their collateral) sufficient to pay the wage claim in full. If unsecured, the Lenders will have no obligation to disgorge funds or otherwise pay any portion of the wage claim. Instead, the claim can only be asserted against the very limited assets of the AR Accessories Group, Inc. Liquidating Trust (the "Trust"), which will undoubtedly result in a much smaller payment, if any, to the Department.

B. The parties' papers suggest there are numerous legal and fact issues yet to be decided by the Bankruptcy Court. If the Department's claim is finally determined to be unsecured, the Lenders will have little material interest in continuing to pursue this litigation. Until a final determination is made on that issue, however, the Lenders will have to continue to participate in the case—simply to protect their interests in the event the lien question is reversed on a final appeal. Additionally, the Trustee has asserted that if the Department's claim is finally determined to be unsecured and is, as the Department has asserted in the alternative, entitled to priority treatment in substantial portion, there will be no estate funds available for distribution to unsecured nonpriority creditors in the Debtor's underlying bankruptcy case. Until this issue is firmly resolved, the Trustee contends that he is forced to either continue to work toward resolution of dozens of claims of unsecured creditors, which may ultimately be for naught,

or leave all of that work undone and unresolved to be re-started after final resolution of this litigation.

C. There is a substantial difference of opinion on the only legal issue resolved by the Order. Plaintiffs-Appellants' papers cite at least one circuit court decision and the decisions of several lower courts in favor of their interpretation of the subject statute. They also cite what is perhaps the leading treatise on Bankruptcy, COLLIER ON BANKRUPTCY, in support of their position. Defendant-Appellee, on the other hand, cites two circuit court decisions and the decisions of several lower courts in support of its interpretation. The Seventh Circuit Court of Appeals has not decided the question.

D. The parties suggest, and the Court believes, that a final determination of the lien question may advance a final resolution of the case. Until this issue is finally resolved, neither the Lenders, the Trustee nor the Department know whether the Department's $5.27 million wage claim is going to be paid in full or paid a (small) pro-rata share, nor do they know whose pot of money the payment will come from—the Lenders' or the Trust's. If it appears the Department's only recourse is against the Trust, the parties may well choose to settle and end the case, rather than continue a fight over very limited funds. Under the circumstances, the question presented is controlling of the future course of this litigation and the course of the Debtor's bankruptcy case, and resolution of this pure question of law is likely to speed the resolution of both.

Dated at Milwaukee, Wisconsin this 14th day of August 2002.

SO ORDERED,

/s/_____
HON. RUDOLPH T. RANDA
U.S. District Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 98-22580-JES,
Advisory No. 98-2500

[Filed July 18, 2001]

In re:

AR ACCESSORIES GROUP, INC.,
Debtor.

SCOTT PELTZ, TRUSTEE OF THE AR ACCESSORIES GROUP, INC. LIQUIDATING TRUST, and
BANK ONE, WISCONSIN,
Plaintiffs,

-v-

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,
Defendant.

DECISION

This controversy pits the interests of Bank One, Wisconsin, on behalf of itself and as agent for First Bank

Milwaukee N.A. and Harris Bank ("Lenders"), and Scott Peltz, trustee of AR Accessories Group, Inc. Liquidating Trust ("trustee")[1], against the Wisconsin Department of Workforce Development, on behalf of the former employees of the debtor ("Department"). Each side contends that it holds a lien interest superior to that of the other side. The parties have presented cross motions for partial summary judgment with respect to Counts 6, 7, and 10 of the adversary complaint brought by the Lenders and trustee and also with respect to the objection by the Lenders and trustee to the Department's proof of claim, which has been consolidated with this adversary proceeding.

A joint stipulation of facts has been submitted. Briefs and oral arguments have also been presented to the court.

This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(B), (K), and (O).

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56, made applicable to adversary proceedings by Fed. R. Bankr. P. 7056, summary judgment is appropriate where the pleadings and affidavits establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d

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[1] The Lenders hold a lien in substantially all of the debtor's assets. However, the trustee's interest is aligned with that of the Lenders by virtue of the debtor's confirmed plan of liquidation. If the trustee and Lenders prevail in this dispute, it will result in a dividend for the unsecured creditors.

202 (1986). The court's responsibility at this stage is not to resolve any disputed issues of fact, but to determine whether any such material factual issues exist which would preclude the granting of a motion for summary judgment. In re Scalia, 214 B.R. 697, 702 (Bankr. E.D. N.Y. 1997). A fact is material if it might affect the outcome of the suit under the governing law. Liberty Lobby, 477 U.S. at 248, 106 S. Ct. at 2510. The court must resolve all ambiguities and draw all reasonable inferences in the light most favorable to the non-moving party. U.S. v. Rem, 38 F.3d 634, 643 (2nd Cir. 1994); Shank v. William R. Hague, Inc., 192 F.3d 675, 681 (7th Cir. 1999).

ISSUES INVOLVED

1. Is the Department's lien[2] void in violation of 11 U.S.C. §§ 362(a)(4) and (5)?

2. Is the Department's lien voidable under 11 U.S.C. § 549?

3. Is Wis. Stats. § 109.09(2) preempted by the Bankruptcy Code and the Supremacy Clause Article VI of the United States Constitution?

4. If the Department's proof of claim is not entitled to lien status, is it entitled to administrative or wage priority treatment under the Bankruptcy Code, in full or in part?

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[2] Whenever the terms "Department's lien" and "wage earners' lien" appear in this decision, they are interchangeable.

FACTS

On March 13, 1998, the debtor filed a petition for relief under chapter 11 of the Bankruptcy Code. One week earlier, on March 6, 1998, the Department initiated an investigation of the debtor to determine whether there was a violation of Wis. Stats. § 109.07 (Wisconsin plant closing law). This investigation was prompted by complaints from Michael Miller, Mayor of the City of West Bend, and Janis Zommers, union representative of Local 7915, United Paperworkers International Union, both of whom alleged that there was insufficient advance notice of the plant closing at the West Bend, Wisconsin facility. The investigation was subsequently expanded to include the office facility on Brown Deer Road, Milwaukee, Wisconsin ("Brown Deer facility"). The Department continued its investigation after the chapter 11 petition was filed. On February 24, 1999, the Department made its initial determination concluding that there were mass layoffs at the manufacturing plant at West Bend and also at the Brown Deer facility. The Department further concluded that the layoffs at West Bend on February 27, 1998, and at the Brown Deer facility between February 27 and May 13, 1998, violated the Wisconsin plant closing law which required 60 days advance notice of business closing or mass layoff.

On June 11, 1998, the Department filed a petition for wage earners' lien under § 109.09(2) of the Wisconsin statutes with the Clerk of the Circuit Court of Milwaukee County and on June 12, 1998 filed a similar petition with the Clerk of the Circuit Court of Washington County. On August 7, 1998, the Department filed a proof of claim with the Clerk of the United States Bankruptcy Court for the Eastern District of Wisconsin in Case No. 98-22580 in the sum of approximately $6.95 million. In its claim, the Department stated that if this court concludes that the Department did not

hold a valid lien, its claim is entitled to administrative priority in the alternative under § 503 or wage priority under § 507 of the Bankruptcy Code. This proof of claim was subsequently amended twice: first, on August 9, 1999 in the sum of $4.87 million and later on November 1, 1999 in the sum of $5.27 million. Both amendments contained alternative requests for administrative or wage priority, as made in the original proof of claim. The Department's proof of claim included amounts purportedly owing to the debtor's former employees, some of whom are members of the United Paperworkers International Union Local 7915 ("union"). Although the union compromised its claim with the debtor, the Department contends that it is not bound by these terms with respect to the union employees for that portion of the claim consisting of plant closing wage claims under § 109.07 of the Wisconsin statutes. The order of this court which approved the compromise between the union and debtor stated, in part, that it "makes no determination as to the rights of Wisconsin respecting a claim that it might have under state or federal law . . . nor of any parties' defenses to such claims."

In May of 1998 the debtor's assets were liquidated with the rights of the parties attaching to the net sales proceeds. These net sales proceeds totalled approximately $23,750,000. The Department and the Lenders entered into an agreement at a hearing before this court on June 22, 1998 involving Lenders' motion for a provisional release of the sale proceeds of the debtor's assets. That agreement provided that the issues of whether the Department's post-petition actions violated the automatic stay and whether Wis. Stats. § 109.09 was preempted by the Bankruptcy Code and by the Supremacy Clause of the United States Constitution shall be determined by this court. The parties also agreed that all remaining issues dealing with Wis. Stats. § 109 (including whether there was an unlawful violation of the business closing/mass layoff

notification provisions) shall be held in abeyance with the Department preserving its right to ask this court to abstain in favor of a state court of competent jurisdiction as to these remaining issues.

The debtor and the creditors' committee's joint plan of liquidation was confirmed by this court on March 8, 1999.

LAW

This dispute centers around Wisconsin's wage earners' lien law, more specifically Wis. Stats. § 109.09(2), and its impact upon this bankruptcy case. This law first became effective in Wisconsin on June 11, 1976 ("1975 Act") and has since undergone several revisions. The 1975 Act created a super-priority lien in favor of wage earners over all other liens, without any exception, regardless of whether such other liens arose prior or subsequent to the wage earners' lien.

In 1993, Wis. Stats. § 109.09(2) was revised ("1993 Act"). This revision, while retaining super-priority status for wage earners, made several changes. These changes included extending the right to enforce this lien under Wis. Stats. § 109.03(5) to the former employees. Previously, only the Department was able to enforce the wage claim liens after receiving an assignment of the wage claims from the former employees. The 1993 Act, without explanation, also removed the following sentence which had appeared in the 1975 Act:

> Any such lien shall exist as of the last date on which services were performed for the employer and for which wages are due and owing.

The 1993 Act added the following sentence:

> The department or employee must file a petition within two years after the date that the wages were due.

The 1993 Act also declared that the lien shall cease to exist unless an action to enforce the lien is brought within the 2-year statute of limitations under Wis. Stats. § 893.44.

In 1995, Wis. Stats. § 109.09(2) was revised to give the state-created environmental lien a priority over the wage earners' lien ("1995 Act").

In 1997, the environmental lien priority over the wage earners' lien was removed ("1997 Act 27"). Later in 1997, a further amendment was made, effective June 17, 1998 – less than one week after the Department filed its lien petitions in this case – which entirely rescinded the wage earners' super-priority lien status ("1997 Act 237").

The current version of Wis. Stats. § 109.09(2), effective September 1, 2000, again restored super-priority status to the wage earners' lien over all liens, both before and subsequent to the wage earners' liens--except for liens held by financial institutions which originated before the creation of the wage earners' lien ("1999 Act 198"). There is now pending in the Wisconsin legislature 2001 Senate Bill 17 which, if enacted, would once again give the wage earners' lien precedence over a lien of a financial institution that originated both before and after the wage earners' lien was created.

The Wis. Stats. § 109.09(2) version appearing in the 1995-1996 statutes (essentially the 1993 Act with the single addition made in 1995 giving the environmental lien a priority over the wage earners' lien) applies in this case. This statute, together with other statutes and the Supremacy Clause of the

United States Constitution which are all referred to in this decision, are set forth in pertinent part in the annexed appendix. Hereafter, whenever Wis. Stats. § 109.09(2) is discussed, unless otherwise specifically noted, it shall mean the version of this statute which applies in this case and which appears in Part IV of the annexed appendix.

The original 1975 Act of Wis. Stats. § 109.09(2) applied in the federal cases of In re Napco Graphic Arts, Inc., 51 B.R. 757 (Bankr. E.D. Wis. 1985) (aff'd in part, reversed in part 83 B.R. 558 (E.D. Wis. 1988)), and Matter of Kubly, 65 B.R. 845 (W.D. Wis. 1986). The subsequent version of Wis. Stats. § 109.09(2), now before this court, was also the identical version before the Court of Appeals in In re Pfister, 216 Wis. 2d 243, 576 N.W.2d 554 (Wis. Ct. App. 1998). Napco and Kubly both held that the 1975 Act was limited to solvent employers and had no application in a bankruptcy case. In Napco, Judge Clevert recognized that Wis. Stats. § 109.09(2) had not as yet been interpreted by any Wisconsin appellate courts. See Napco, 51 B.R. at 761. Pfister, however, which was decided after Napco and Kubly, held that Wis. Stats. § 109.09(2) applied to both solvent and insolvent employers. The implications of Wis. Stats. § 109.09(2) must be considered when an insolvent employer is in bankruptcy if this court is to follow Pfister. It is well established that bankruptcy law normally looks to state law to determine property interests. Butner v. U.S., 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136 (1979); In re Badger Lines, Inc., 202 F.3d 945 (7th Cir. 2000); In re Badger Lines, Inc., 224 Wis. 2d 646, 590 N.W.2d 270 (Wis. 1999); In re Copper King Inn, 918 F.2d 1404 (9th Cir. 1990); In re Paramount Int'l, 154 B.R. 712, 714 (Bankr. N.D. Ill. 1993). The Wisconsin Supreme Court has not ruled on this issue. However, Pfister was decided by the intermediate Wisconsin Court of Appeals. Even in the absence of a ruling by the

highest court in the state, a federal court must defer a determination of state law to a state appellate court unless it is convinced that the highest court of the state would decide the issue differently. In re Jones, 219 B.R. 1013, 1017 (Bankr. N.D. Ill. 1998). This court is not convinced that the Wisconsin Supreme Court, which in fact denied a petition for review of Pfister (Pfister v. Milwaukee Economic Development Corp., 217 Wis. 2d 518, 580 N.W.2d 688 (Wis. 1998)) would rule differently.

It therefore accords deference to Pfister and determines that Wis. Stats. § 109.09(2) applies to an insolvent employer.

DID THE DEPARTMENT'S POST-PETITION ACTIONS VIOLATE § 362(a) AND THEREBY RENDER ITS LIEN VOID?

Lenders and the trustee contend that the Department's lien violated §§ 362(a)(4) and (5) and is therefore void because:

1. The lien, if created at all, arose post-petition.

2. Even if the lien was created pre-petition, it is not within the exception to the automatic stay under § 362(b)(3) because Wis. Stats. § 109.09(2) does not contain an express provision for perfection relating back to an earlier time.

Each of these grounds shall now be analyzed.

When, if at all, was the lien created?

Lenders and the trustee both argue that the wage earners' lien was not created pre-petition. However, each has a different view as to when the lien arose.

Lenders assert that there is no lien until either an employee or the Department brings an action under Wis. Stats. § 109.03(5). Sec. 109.03(5) reads in part that: "An employee who brings an action against the employer under this subsection shall have a lien upon all property of the employer . . . ." Lenders then argue that because no action was ever brought by either the Department or any employee – pre-petition or post-petition – the lien never was created. That argument is flawed for several reasons. Wis. Stats. § 109.03(5) relating to the "bringing of an action" only applies with respect to an action taken by employees and not by the Department. The following language in Wis. Stats. § 109.09(2) provides support for the conclusion that the bringing of an action is an act to enforce a lien already in existence:

> The lien ceases to exist if the Department or the employee does not bring an action to enforce the lien (underlining added for emphasis) within the period prescribed in § 893.44 for the underlying wage claim

A similar situation occurred in In re Lionel Corp., 29 F.3d 88, 93 (2nd Cir. 1994), where the court declared that if noncompliance with a statute terminated the lien, then the lien must have been in existence before such noncompliance. That same argument by the Lenders, asserting an action must first be brought before the wage earners' lien arises, was also presented and rejected in Pfister. See Pfister, 216 Wis. 2d at 249 n. 2.

The trustee's position on when the wage earners' lien arises differs from that held by the Lenders. The trustee asserts that the lien arises when, in accordance with Wis. Stats. § 109.09(2), the Department or employee files a verified petition claiming a lien with the Clerk of the Circuit

Court of the county where the services were performed, pays the prerequisite filing fee, and serves a copy of that petition upon the employer by personal service. The trustee then points out that all of these steps occurred post-petition and therefore the automatic stay was violated. That argument, too, is rejected by this court. Wis. Stats. § 109.09(2) deals with lien perfection, not lien creation. The phrase "takes effect" as it appears in Wis. Stats. § 109.09(2) refers to perfection. Both the Lenders and the Department acknowledge that in their respective briefs to this court. The post-petition acts taken by the Department were merely steps required to complete perfection of the Department's lien interest.

The Department declined to express its view on when the wage earners' lien is created under Wisconsin law. Instead, it argues that, even if the lien came into existence after the bankruptcy petition was filed, the lien would not violate the automatic stay because of § 362(b)(3) of the Bankruptcy Code. The court also rejects that view. The exception to the automatic stay under § 362(b)(3) only applies if an "interest in property" held by a creditor was created before the filing of bankruptcy. See Makoroff v. City of Lockport, 916 F.2d 890, 892 (3rd Cir. 1992). See also Equibank NA v. Wheeling-Pittsburgh Steel Corp., 884 F.2d 80, 85 (3rd Cir. 1989); and In re Perona Bros. Inc., 186 B.R. 833, 837 (D. N.J. 1995). Under § 101(37) of the Bankruptcy Code, a "lien" is an "interest in property." In re Microfab, Inc., 105 B.R. 152, 157 (Bankr. D. Mass. 1989).

The only exception to the automatic stay which permits both creation and perfection of a lien after a bankruptcy case has been filed appears in § 362(b)(18) of the Bankruptcy Code. This section is limited to a specific type of lien and declares that the filing of a bankruptcy petition does not stay certain taxing entities from creating or perfecting statutory

liens for *ad valorem* property taxes which became due after the commencement of the case. There is no similar exception to the automatic stay with respect to wage earners' liens. If there is to be such an exception to the automatic stay which would permit the creation of post-petition wage earners' liens, it is for Congress to create. As a general rule of statutory construction, where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of a contrary intent. Andrus v. Glover Construction Co., 446 U.S. 608, 616-17, 100 S. Ct. 1905, 1910, 64 L. Ed. 2d 548 (1980); In re Candor Diamond Corp., 26 B.R. 850, 851 (Bankr. S.D. N.Y. 1983).

The original 1975 Act version of Wis. Stats. § 109.09(2) stated that the lien existed "as of the last date on which services were performed for the employer and for which wages are due and owing." Although this sentence was omitted from the Wis. Stats. § 109.09(2) version now before this court, nothing in the 1993 Act or in its legislative history provides any indication that such omission was made for the purpose of changing the date when the lien was created. The sentence added in the 1993 Act declaring that the Department or employee must file the petition within two years after the date that the wages were due further suggests that there was no intent to make a change in the time when the wage earners' lien came into existence. A study of the legislative history to the 1993 Act further buttresses this conclusion. In a memorandum dated April 15, 1993 from Howard Bernstein, general counsel to the Office of the Secretary for DILHR[3] to J. Sheehan Donoghue, the division administrator for the Equal

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[3] DILHR (Department of Industry, Labor and Human Relations) is now known as Department of Workforce Development.

Rights Division of DILHR, regarding the legislative draft of the 1993 Act, the following appears:

> This draft adds some specific procedures to the existing provision that gives DILHR a lien on an employer for the amount of a wage claim or wage deficiency.
>
> The procedures basically consist of two things: (1) formally notifying the employer of the lien, by formal service or certified mail, and (2) filing a lien petition with the clerk of circuit court. The draft clears up a longstanding legal problem by specifying that the lien does not take effect until both of these steps have taken place. (The current lien statute simply states that the lien "exists" as soon as the work has been done; employers and their bankers have argued that it is unconstitutional to give priority to a lien without providing notice to the person who is subject to the lien.)
>
> These changes are intended to do no more than allow wage lien claims to go forward as any other lien claim does. (underlining added for emphasis) A lien could not be enforced or foreclosed without the filing of a lawsuit and a judgment of attachment or foreclosure from the court.

The purpose of the 1993 Act was to provide procedures for perfection and enforcement--not for creation – of the lien. Lenders' counsel, in oral argument, conceded that the 1993 Act was a procedural statute. This same conclusion was reached in Pfister where the court stated that:

> We conclude, however, that the amendment simply added an enforcement mechanism to a previously established right, thus producing a procedural change.

Pfister, 216 Wis. 2d at 254.

This court therefore rejects the interpretations of all parties to this dispute as to the time that the wage earners' lien was created. Instead, it concludes that the lien was created when the last services which remained unpaid were performed. All parties agree that there are some unpaid pre-petition wages due in this case, the extent of which is unknown.

Therefore, the lien was created before this bankruptcy case was filed.

Must there be an express "relation back" provision in Wis. Stats. § 109.09(2) for the exception to the automatic stay under § 362(b)(3) to apply?

Sec. 362(b)(3) states that the automatic stay does not pertain to any act to perfect an interest in property subject to perfection under § 546(b). Sec. 546(b), in turn, permits post-petition perfection of an interest in property held by an entity acquiring an interest in property before the date of perfection if "any generally applicable law" permits such perfection. Based upon the legislative history of § 546(b), the term "generally applicable law" means that the law must apply to cases both inside and outside of bankruptcy. Wis. Stats. § 109.09(2), which also applies both inside and outside of bankruptcy, meets that requirement.

Lenders argue that § 546(b) applies only to statutory liens that contain specific language which relates back to a date

preceding the filing of bankruptcy and asserts that there is no such express provision for relation back in Wis. Stats. § 109.09(2), citing In re Electric City, Inc., 43 B.R. 336, 342 (Bankr. W.D. Wash. 1984). Other courts, however, take the opposite view by finding that nothing in § 546(b) indicates that it applies only when the lienor fits within a "relation back" statute. In re Lionel Corp., 29 F.3d 88, 93 (2nd Cir. 1994). See also, In re Microfab, Inc., 105 B.R. 152, 158 (Bankr. D. Mass. 1989); 229 Main Street Limited Partnership v. Commonwealth of Massachusetts Department of Environmental Protection, 251 B.R. 186, 192-193 (D. Mass. 2000).

This court is persuaded that the holdings in Lionel Corp. and in the cases aligned with Lionel Corp. should be followed. It concludes that there is no requirement for Wis. Stats. § 109.09(2) to expressly provide for retroactive perfection.

The Department's lien is not void under § 362(a). The post-petition actions taken by the Department fit within the exception created by § 362(b)(3).

IS THE LIEN VOIDABLE UNDER § 549?

The trustee and Lenders also submit that the Department's lien is voidable under 11 U.S.C. § 549. In order for the lien to be voidable under § 549, all of the following four elements must be established:

1. A transfer,

2. Occurring post-petition,

3. Of property of the estate, and

4. Without authorization by the court or by the Bankruptcy Code.

The Department contends that the fourth element is absent because its post-petition actions were authorized by the Bankruptcy Code. This court agrees, based on it conclusion that all of the Department's post-petition actions are within the § 362(b)(3) exception to the automatic stay. It therefore follows that the Department's lien was authorized by the Bankruptcy Code. The Department's lien is not voidable under § 549 because all four elements have not been satisfied.

IS WIS. STATS § 109.02(2) PREEMPTED BY § 507(a) OF THE BANKRUPTCY CODE AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION?

Under Wis. Stats. § 109.09(2), the Department's lien takes priority over the Lenders' lien. The Lenders, citing Napco Graphics and Kubly, contend that Wis. Stats. § 109.09(2) "reorders the priority of claims" in this bankruptcy case and is preempted by federal bankruptcy law and the Supremacy Clause of the United States Constitution. Lenders recognize that in Napco and Kubly, the respective courts held that there was no violation of the Supremacy Clause. However, Lenders submit that this holding resulted only because of the court's conclusion in both cases that Wis. Stats. § 109.09(2) did not apply to insolvent employers. Lenders assert that, if Wis. Stats. § 109.09(2) had been found to apply to insolvent employers (as this court now finds in light of Pfister), this statute would violate the priority scheme of the Bankruptcy Code and the Supremacy Clause of the United States Constitution.

The Department responds that Wis. Stats. § 109.09 does not conflict with the Bankruptcy Code and is not preempted by the Supremacy Clause because the priority scheme under § 507(a) applies only to unsecured claims and not to secured claims. The Department further states that the Lenders' contention that there would have been a violation of the Supremacy Clause in Kubly and Napco upon a finding that Wis. Stats. § 109.09 applied to insolvent employers is an incorrect reading of these cases.

This court agrees with the Department that the Bankruptcy Code priority scheme as set forth in § 507(a) deals only with unsecured claims. Judge Clevert stated in Napco the following:

> Inasmuch as federal bankruptcy law clearly leaves the determination of lien priorities to non-bankruptcy law, a state statute which creates a valid lien would not frustrate bankruptcy law and, therefore, would not be rendered invalid by the Supremacy Clause. It is, accordingly, determined that the statutory lien created by § 109.09(2) is not violative of the Supremacy Clause.

51 B.R. at 763.

The Supremacy Clause should not be invoked freely. It should only be applied where there is an unavoidable and inconsistent conflict with the Bankruptcy Code. In Perez v. Campbell, 402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed. 2d 233, the United States Supreme Court declared that, in determining whether the Supremacy Clause applies, a court must consider the purposes and policies which are served by the federal and state legislation. Only if the federal and state statutes are clearly in conflict with each other should the court then decide

if the state law stands as an obstacle to the execution of the full purposes and objectives of Congress. Perez v. Campbell, 402 U.S. at 648. Judge Squires in In re Crossman, 259 B.R. 301, 307 (Bankr. N.D. Ill. 2001), aptly stated the following:

> Federal and state statutes should be construed in a congruent fashion, rather than summarily found in conflict as an important application of the principle of comity between federal and state statutory schemes.

The Seventh Circuit Court of Appeals, in an *en banc* decision rendered in In re Bentz Metal Products Co., Inc., 253 F.3d 283, 2001 WL 624863, recently held that a claim based upon the Indiana employees' wage lien statute is not pre-empted by § 301 of the Federal Labor Management Relations Act, which governs claims founded directly on rights created by collective bargaining agreements. The court declared that a state law is not pre-empted so long as it does not interfere or conflict with federal law.

In the case at bar, there is no unavoidable conflict between Wis. Stats. § 109.09(2) and § 507(a) of the Bankruptcy Code. A super-priority status afforded to wage earners by virtue of the lien is a recognition of the public policy to protect the wage earner who is necessarily dependent upon his or her labor for the sustenance and the support of himself or herself and his or her family. See Richard H. Nowka and Jeff S. Taylor Kentucky Employees' Wage Liens: A Sneak Attack on Creditors, But Beware of the Bankruptcy Trustee 84 Ky. L. J. 317, 322 (1995-1996). This article further states the following:

> The statute is based upon a well-recognized policy which is written in the statutes of many states and of the federal government, and that is to protect the wage

> earner in many forms of public endeavor which is necessarily dependent upon his daily labor for the sustenance and the support of himself and family, and particularly in such forms as are recognized to be primarily for the benefit of the public good.

Id. at 322. See also Pfister, 216 Wis. 2d 243, 268, 576 N.W.2d 554, which states: "If workers are not paid their wages, they and their families will suffer."

Wis. Stats. § 109.09(2) does not frustrate and is not inconsistent with the underlying policy of the Bankruptcy Code. It is not an obstruction to, nor does it do harm or violence to, the priorities under the Bankruptcy Code. Wis. Stats. § 109.09(2) is not a disguised priority. Wis. Stats. § 109.09(2) applies not only in bankruptcy, but also outside of bankruptcy. The Ninth Circuit Court of Appeals in Anchorage International Inn, Inc., 718 F.2d 1446, 1452 (9th Cir. 1983), declared that there are certain types of state statutory liens, such as mechanics' liens, which are afforded full respect by the bankruptcy law. A wage earners' lien similarly should be given that respect, taking into account the purpose of this statute and the fact that Wisconsin has afforded it a super-priority status. The court in Anchorage International Inn further stated that there is no general policy against state-created liens that favor one class of creditors over others. Anchorage International Inn, 718 F.2d at 1451. The Ninth Circuit therefore rejected the trustee's contention that states cannot permit some creditors to receive more of the proceeds of the bankruptcy assets than others. It concluded that there is no statutory bankruptcy policy forbidding a state from giving one creditor a greater right to payment of its claim from a given asset than that conferred on another. Anchorage International Inn, Inc., 718 F.2d at 1451.

Accordingly, this court concludes that the Wisconsin wage earners' lien is not preempted by § 507(a) of the Bankruptcy Code and the Supremacy Clause of the United States Constitution.

IS THE DEPARTMENT'S CLAIM ENTITLED TO PRIORITY TREATMENT UNDER THE CODE?

The Department's proof of claim states that, if the Department's lien is found to be invalid, its claim should be treated as either an administrative priority under §§ 503(b)(1) and 507(a)(1) or a wage priority claim under §§ 507(a)(3) and 507(a)(4). This claim is comprised of two portions: unpaid wages and other benefits actually earned by the former employees ("wage claim portion") and damages arising out of alleged plant closing violations, attorneys' fees, business surcharges, and civil penalty assessments ("constructive portion"). Lenders and trustee do not challenge the wage claim portion with respect to the requested priority treatment. They do, however, contend that the constructive portion of this claim is not entitled to any priority treatment as a matter of law.

This court has determined that the wage earners' lien is valid. It now determines that the wage claim portion of its proof of claim for pre-petition unpaid wages[4] is covered by this lien. This holding renders moot the Department's alternative request for priority treatment of the unpaid pre-petition wage claim portion of its proof of claim.

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[4] The court is unaware of any claim being made by the Department of the existence of any unpaid post-petition wages.

The treatment of the constructive portion of this claim, however, presents another matter. Certain genuine issues of material facts must first be resolved before determining how the constructive portion of this claim is to be treated. These issues include:

1. Whether there was a violation by the debtor of the Wisconsin plant closing law and

2. If there was a violation, the amount of the constructive portion of this claim and whether such amount also includes the plant closing claims of the union employees.

If it is found that there was no violation of the Wisconsin plant closing law, no further inquiry is necessary. However, if it is found that the debtor did violate the Wisconsin plant closing law, the amount allowable under the constructive portion of the claim then becomes an issue. At this time, however, that determination is premature.

CONCLUSION

The version of Wis. Stats. § 109.09(2) in existence when this bankruptcy petition was filed on March 13, 1998 is controlling. The court fully recognizes the Lenders' public policy argument that giving the wage earners' lien a priority over the Lenders' lien would have a chilling effect in the commercial market with respect to the making of loans. On the other hand, there is also a powerful public policy argument in favor of the wage earners--namely, the need to ensure that wage earners and their families are not deprived of earned wages. The priority of liens is a matter for the legislature. It is the court's task to interpret the version of Wis. Stats. § 109.09(2) which existed on March 13, 1998

when this bankruptcy case was filed. This court concludes that, under the version of Wis. Stats. § 109.09(2) which applies here, the wage earners' lien trumped the Lenders' lien.

The wage earners' lien is not void under § 362 or voidable under § 549. It is a valid lien.

Wis. Stats. § 109.09(2) is not preempted by the Bankruptcy Code and the Supremacy Clause of the United States Constitution.

There are genuine issues of material fact which must first be resolved before addressing the question of how the constructive portion of the Department's claim is to be treated.

The motions for partial summary judgment of Lenders and the trustee are **DENIED**. The motion for partial summary judgment of the Department is **GRANTED**.

A separate order shall issue.

Dated at Milwaukee, Wisconsin, this 18th day of July, 2001.

BY THE COURT:

/s/_____
JAMES E. SHAPIRO
U. S. BANKRUPTCY JUDGE

APPENDIX

History of Wisconsin Statute 109.09(2)

I. (Original language)(Effective as law as of June 11, 1976)

Pursuant to its authority under sub. (1) to take assignments of wage claims and wage deficiencies and to maintain actions for the benefit of employes, the department shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency. Such lien shall take precedence over all other debts, judgments, decrees, liens or mortgages against the employer and may be enforced in the manner provided in ss. 289.09 to 289.12 and 409.501 to 409.507, insofar as such provisions are applicable. Any such lien shall exist as of the last date on which services were performed for the employer and for which wages are due and owing.

II. (Statute as amended after 1993 legislative session)(Effective as law as of December 9, 1993)

The department, under its authority under sub. (1) to maintain actions for the benefit of employes, or an employe who brings an action under s. 109.03(5) shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency. A lien under this subsection takes effect when the department or employe filed a verified petition claiming the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed pays the fee specified in s. 814.61(5) to

that clerk of circuit court and serves a copy of that petition on the employer by personal service in the same manner as a summons is served under s. 801.11 or by certified mail with a return receipt requested. The department or employe must file the petition within 2 years after the date that the wages were due. The petition shall specify the nature of the claim and the amount claimed, describe the property upon which the claim is made and state that the petitioner claims a lien on that property. The lien shall take precedence over all other debts, judgments, decrees, liens or mortgages against the employer and may be enforced in the manner provided in ss. 779.09 to 779.12, 779.20 and 779.21, insofar as such provisions are applicable. The lien ceases to exist if the department or the employe does not bring an action to enforce the lien within the period prescribed in s. 893.44 for the underlying wage claim.

III. (Statute as amended after 1995 legislative session) (Effective as law as of January 1, 1997)

The department, under its authority under sub. (1) to maintain actions for the benefit of employes, or an employe who brings an action under s. 109.03(5) shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency. A lien under this subsection takes effect when the department or employe filed a verified petition claiming the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed pays the fee specified in s. 814.61(5) to that clerk of circuit court and serves a copy of that petition on the employer by personal service in the same manner as

a summons is served under s. 801.11 or by certified mail with a return receipt requested. The department or employe must file the petition within 2 years after the date that the wages were due. The petition shall specify the nature of the claim and the amount claimed, describe the property upon which the claim is made and state that the petitioner claims a lien on that property. The lien shall take precedence over all other debts, judgments, decrees, liens or mortgages against the employer, except a lien filed under ss. 292.31(8)(i), 292.41(6)(d) or 292.81, and may be enforced in the manner provided in ss. 779.09 to 779.12, 779.20 and 779.21, insofar as such provisions are applicable. The lien ceases to exist if the department or the employe does not bring an action to enforce the lien within the period prescribed in s. 893.44 for the underlying wage claim.

IV. (The statute as first amended in 1997) (Effective as law as of October 14, 1997)

The department, under its authority under sub. (1) to maintain actions for the benefit of employes, or an employe who brings an action under s. 109.03(5) shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency. A lien under this subsection takes effect when the department or employe filed a verified petition claiming the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed pays the fee specified in s. 814.61(5) to that clerk of circuit court and serves a copy of that petition on the employer by personal service in the same manner as a summons is served under s. 801.11 or by certified

mail with a return receipt requested. The department or employe must file the petition within 2 years after the date that the wages were due. The petition shall specify the nature of the claim and the amount claimed, describe the property upon which the claim is made and state that the petitioner claims a lien on that property. The lien shall take precedence over all other debts, judgments, decrees, liens or mortgages against the employer, except a lien filed under ss. 292.31(8)(i) or 292.81, and may be enforced in the manner provided in ss. 779.09 to 779.12, 779.20 and 779.21, insofar as such provisions are applicable. The lien ceases to exist if the department or the employe does not bring an action to enforce the lien within the period prescribed in s. 893.44 for the underlying wage claim.

V. (Statute as of the second 1997 amendments)(Effective as law as of June 17, 1998)

(a) The department of workforce development, under its authority under sub. (1) to maintain actions for the benefit of employes, or an employe who brings an action under s. 109.03(5) shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency.

(b) 1. A lien under par. (a) upon real property takes effect when the department of workforce development or employe files a notice of the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed pays the fee specified in s. 814.61(5) to that clerk of circuit court and serves a copy of that petition on the employer by

personal service in the same manner as a summons is served under s. 801.11 or by certified mail with a return receipt requested. The clerk of the circuit court shall enter the notice of the lien on the judgment and lien docket kept under s. 779.07.

(b) 2. A lien under par. (a) upon personal property takes effect when the department of workforce development or employe files a notice of the lien with the department of financial institutions, pays the fee specified in s. 409.403(5)(b) to the department of financial institutions and serves a copy of the notice on the employer by personal service in the same manner as a summons is served under s. 801.11 or by certified mail with a return receipt requested. The department of financial institutions shall place the notice of the lien in the same file as financing statements are filed under ss. 409.401 and 409.402.

(b) 3. The department of workforce development or employe must file the notice under subd. 1. or 2. within 2 years after the date on which the wages were due. The notice shall specify the nature of the claim and the amount claimed, describe the property upon which the claim is made and state that the person filing the notice claims a lien on that property.

(c) A lien under par. (a) takes precedence over all other debts, judgments, decrees, liens or mortgages that originate after the lien takes effect as provided in par. (b) 1. or 2., except a lien under s. 292.31(8)(i) or 292.81, and may be enforced in the manner provided in ss. 779.09 to 779.12, 779.20 and 779.21, insofar as those provisions are applicable. The lien ceases to exist if the department of workforce development or

the employe does not bring an action to enforce the lien within the period prescribed in s. 893.44 for the underlying wage claim.

VI. (The present statute, as amended after 1999 legislative session)(effective as law as of September 1, 2000)

(a) The department of workforce development, under its authority under sub. (1) to maintain actions for the benefit of employees, or an employee who brings an action under s. 109.03(5) shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency.

(b) 1. A lien under par. (a) upon real property takes effect when the department of workforce development or employee files a notice of the lien with the clerk of the circuit court of the county in which the services or some part of the services were performed, pays the fee specified in s. 814.61(5) to that clerk of circuit court and serves a copy of that petition on the employer by personal service in the same manner as a summons is served under s. 801.11 or by certified mail with a return receipt requested. The clerk of circuit court shall enter the notice of the lien on the judgment and lien docket kept under s. 779.07.

(b) 2. A lien under par. (a) upon personal property takes effect when the department of workforce development or employee files a notice of the lien with the department of financial institutions, pays the fee specified in s. 409.403(5)(b) to the department of financial institutions and serves a copy of the notice on the employer by personal service in the same manner

as a summons is served under s. 801.11 or by certified mail with a return receipt requested. The department of financial institutions shall place the notice of the lien in the same file as financing statements are filed under ss. 409.401 and 409.402.

(b) 3. The department of workforce development or employee must file the notice under subd. 1. or 2. within 2 years after the date on which the wages were due. The notice shall specify the nature of the claim and the amount claimed, describe the property upon which the claim is made and state that the person filing the notice claims a lien on that property.

(c) A lien under par. (a) takes precedence over all other judgments, decrees, liens or mortgages against the employer, except a lien of a financial institution, as defined in s. 69.03(1)(b), that originates before the lien under par. (a) takes effect or a lien under s. 292.31(8)(i) or 292.81, A lien under par. (a) may be enforced in the manner provided in ss. 779.09 to 779.12, 779.20 and 779.21 insofar as those provisions are applicable. The lien ceases to exist if the department of workforce development or the employee does not bring an action to enforce the lien within the period prescribed in s. 893.44 for the underlying wage claim.

VII. Proposed legislation amending Wis. Stat. 109.09(2) (2001 Senate Bill 17)

(c) A lien under par. (a) takes precedence over all other debts, judgments, decrees, liens, or mortgages against the employer, except a lien under s. 292.31(8)(i) or 292.81. A lien under par. (a) may be

enforced in the manner provided in ss. 779.09 to 779.12, 779.20, and 779.21, insofar as those provisions are applicable. The lien ceases to exist if the department of workforce development or the employee does not bring an action to enforce the lien within the period prescribed in s. 893.44 for the underlying wage claim.

SECTION 2. Nonstatutory provisions.

(1) WAGE CLAIM LIENS. Nothwithstanding section 109.09(2)(c), 1999 stats., a lien that exists under section 109.09(2)(a) of the statutes on the day before the effective date of this subsection takes precedence over a lien of a financial institution, as defined in section 69.30(1)(b) of the statutes, that originated before the lien under section 109.09(2)(a) of the statutes took effect.

Wisconsin Statute 109.07

(1)(a) "Affected employee" means an employee who loses, or may reasonably be expected to lose, his or her employment with an employer who is required to give notice under sub. (1m) because of the business closing or mass layoff.

(b) "Business closing" means a permanent or temporary shutdown of an employment site or of one or more facilities or operating units at an employment site or within a single municipality that affects 25 or more employees, not including new or low-hour employees[.]

(d) "Employer" means any business enterprise that employs 50 or more persons in this state[.]

(f) "Mass layoff" means a reduction in an employer's work force that is not the result of a business closing and that affects the following numbers of employees at an employment site or within a single municipality, not including new or low-hour employees:

1. At least 25% or the employer's work force or 25 employees, whichever is greater; or

2. At least 500 employees[.]

(1m) Subject to sub. (5) or (6), an employer who has decided upon a business closing or mass layoff in this state shall promptly notify the subunit of the department that administers § 106.15, any affected employee, any collective bargaining representative of any affected employee, and the highest official of any municipality in which the affected employment site is located, in writing of such action no later than 60 days prior to the date that the business closing or mass layoff takes place[.]

(3)(a) If an employer fails to give timely notice to an affected employee as required under sub. (1m), the affected employee many recover, as provided under sub. (4), all of the following:

1. Pay, for the days during the recovery period described under par. (c) that the employee would have worked if the business closing or mass layoff had not occurred, based on the greater of the following:

a. The employee's regular rate of pay from the employer, averaged over the shorter of the 3-year period preceding the business closing or mass layoff or the entire period during which the employee was employed by the employer.

b. The employee's regular rate of pay from the employer at the time of the business closing or mass layoff.

2. The value of any benefit that the employee would have received under an employee benefit plan during the recovery period described under par. (c), but did not receive because of the business closing or mass layoff, including the cost of medical treatment incurred that would have been covered under the employee benefit plan[.]

(c) The recovery period under par. (a) begins on the day that the business closing or mass layoff occurs. The recovery period equals the number of days in the period beginning on the day on which an employer is required to give notice under sub. (1m) and ending on whichever of the following occurs first:

1. The day that the employer actually gave the notice to the employee.

2. The day that the business closing or mass layoff occurred.

(4)(a) An employee whose employer fails to notify timely the employee under sub. (1m) may file a claim with the department. If the employee files a claim with the department no later than 300 days after the business closing or mass layoff, the department shall, in the manner provided in § 109.09, investigate the claim, determine the number of days that the employer was late in providing notice and, on behalf of the employee, attempt to recover from the employer the payment under sub. (3).

(b) If the department does not recover payment within 180 days after a claim is filed or within 30 days after it notifies the employee of its determination under par. (a), whichever is

first, the department shall refer the claim to the department of justice. The department of justice may bring an action in circuit court on behalf of the employee to recover the payment under sub. (3).

(c) If the department of justice does not bring an action under par. (b) within 120 days after the claim is referred to it, the employee may bring an action in circuit court to recover the payment under sub. (3)[.]

Wisconsin Statute 109.03(5).

Enforcement [...] Each employee shall have a right of action against any employer for the full amount of the employee's wages due on each regular pay day as provided in this section and for increased wages as provided in § 109.11(2), in any court of competent jurisdiction. An employee may bring an action against an employer under this subsection without first filing a wage claim with the department under § 109.09(1). An employee who brings an action against an employer under this subsection shall have a lien upon all property of the employer, real or personal, located in this state as described in § 109.09(2).

Relevant Bankruptcy Code provisions

11 U.S.C. § 101(37) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation[.]

11 U.S.C. § 362(a) Except as provided in subsection (b) of this section, a petition filed under [...] this title, [...] operates as a stay, applicable to all entities, of-

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against the property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title[...]

11 U.S.C. § 362(b) The filing of a petition under [...] this title, [...] does not operate as a stay-

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title.

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax [...] if such tax comes due after the filing of the petition.

11 U.S.C. § 503(b) After notice and a hearing, there shall be allowed administrative expenses [...] including-

(1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

11 U.S.C. § 507(a) The following expenses and claims have priority in the following order:

(3) [...] allowed unsecured claims, but only to the extent of $4000* for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the

petition or the date of the cessation of the debtor's business, whichever occurs first, for-

> *(Under the current Bankruptcy Code the dollar amount is $4300, but because this case was commenced prior to April 1, 1998, the applicable dollar amount is $4000).

(A) wages, salaries, or commissions, including vacation, severance, and sick leave earned by an individual[.]

11 U.S.C. § 546(b) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that-

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or
(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

11 U.S.C. § 549

(a) Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate-

(1) made after the commencement of the case; and [...]

(2)(B) that is not authorized under this title or by the court.

Constitution of the United States, Article VI, Clause 2

This Constitution, and the Laws of the United States [...], shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ORDER DENYING PARTIAL SUMMARY JUDGMENT MOTIONS OF LENDERS AND TRUSTEE AND GRANTING PARTIAL SUMMARY JUDGMENT MOTION OF THE DEPARTMENT

Based upon the court's written decision made this date,

IT IS ORDERED:

1. The motions of Bank One, Wisconsin, on behalf of itself and as agent for First Bank Milwaukee N.A. and Harris Bank ("Lenders") and Scott Peltz, trustee of AR Accessories Group, Inc. Liquidating Trust ("trustee") for partial summary judgment are **DENIED**.

2 The motion of the Wisconsin Department of Workforce Development on behalf of the former employees of the debtor ("Department") for partial summary judgment is **GRANTED**.

Dated at Milwaukee, Wisconsin, this 18th day of July, 2001.

BY THE COURT:
/s/_____
JAMES E. SHAPIRO
U. S. BANKRUPTCY JUDGE

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